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Supreme Court of the United States

OCTOBER TERM, 1960.

No. 829

GUISEPPE BOLOGNA,

Appellant,

versus

HAZEL MORRISSEY,

Appellee.

On Appeal from the Supreme Court of the State of Mississippi.

MOTION TO DISMISS APPEAL.

FRANK E. EVERETT, JR.,
Of BRUNINI, EVERETT, GRANTHAM & QUIN,
810 First National Bank Building,
Vicksburg, Mississippi,
Attorneys for Appellee.

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On Appeal from the Supreme Court of the State of Mississippi.

MOTION TO DISMISS APPEAL.

NOW COMES the Appellee and moves the Court to dismiss the appeal from the Supreme Court of Mississippi requested herein for the reason that a substantial federal question is not presented.

FRANK E. EVERETT, JR.,
Of BRUNINI, EVERETT, GRANTHAM & QUIN,
810 First National Bank Building,
Vicksburg, Mississippi,
Attorneys for Appellee.

CERTIFICATE OF SERVICE.

I, Frank E. Everett, Jr., of counsel for Miss Hazel Morrissey, Appellee, in the above cause and a member of the bar of the Supreme Court of the United States, do hereby certify that service of the above Motion to Dismiss Appeal has been had upon Honorable Landman Teller, Counsel of Record for the Appellant by personally delivering a true and correct copy of the above and foregoing Motion to him at his office at 1205 Monroe Street, Vicksburg, Mississippi.

This the 12 day of April, 1961.

FRANK E. EVERETT, JR.,
Of BRUNINI, EVERETT, GRANTHAM & QUIN,
810 First National Bank Building,
Vicksburg, Mississippi,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

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GUISEPPE BOLOGNA,
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versus

HAZEL MORRISSEY,
Appellee.

On Appeal from the Supreme Court of the State of Mississippi.

BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL.

No substantial federal constitutional question is presented in this case.

The courts in Mississippi, including the Court of Final Resort, have determined the facts based primarily on the uncontroverted admissions of the Appellant Bologna himself.

The Mississippi Supreme Court found that the record of testimony in the case clearly showed the following:

> "Bologna, called as an adverse witness, admitted that he had been selling liquor to Mike T. Morrissey, operating in the City of Vicksburg as Delta Distributing Company since 1946; that his place of busi-

> ness was in Baton Rouge, Louisiana; that he went back and forth to Vicksburg to confer with Morrissey; that bills of lading for the shipments were made to Vicksburg and the liquor was sold to Morrissey in Mississippi; that he knew that Morrissey was selling this liquor in Mississippi; that the notes and deeds of trust involved in this litigation were given as security for Morrissey's purchases of liquor; that he knew that the sale of liquor in Mississippi was illegal; that he had been in Morrissey's place of business about fifty times, and, on occasions, had made collections while there; and that the notes and deeds of trust were executed and delivered in Mississippi." Opinion of the Supreme Court of Mississippi, page A6 of Appellant's Jurisdictional Statement.

In the Jurisdictional Statement, the Appellant argues that the Court should have found differently on a purely factual determination.

This Honorable Supreme Appellate Court will not go behind the final adjudication of facts duly made by the courts of Mississippi having jurisdiction. To do otherwise would make this august Appellate Court a menial fact finding body.

Appellant's Jurisdictional Statement patently discloses many reasons why there is no substantial federal constitutional question for this Court.

1.

There was no original "Louisiana Contract" of sale and the whiskey was not "bought in Louisiana". As the Ap-

pellant Bologna admitted and the Mississippi Supreme Court adjudicated, the bills of lading on said liquor sales showed delivery to Vicksburg, Mississippi, where the transaction was completed and consummated by such delivery. It was therefore a Mississippi transaction and was subject entirely to the Laws of Mississippi pertaining to such sales.

In a sale of this type, delivery was an essential element and the sale was not completed until delivery under the bill of lading had been accomplished at the destination shown by such bills of lading.

All of this the Appellant Bologna admitted on cross-examination.

B[illegible]ppellant says that this Court should accept what Bologna testified to on a direct examination under the obvious leading of his counsel and reject what he said on cross-examination.

We earnestly submit that this is a question for the Mississippi Court and it has been determined by the Court of Final Resort in Mississippi.

In 11 Am. Jur. 395, Section 113 it is stated:

> "In many cases, as in transactions involving the sale of liquor, there may be statutes in one jurisdiction restricting the rights of the parties or even rendering the entire transaction void if the sale is consummated therein, whereas in another jurisdiction no such statutes exist. Delivery of the property is

> generally, though not necessarily, the act by which an executory contract becomes an executed contract. Therefore, in such case, the place of delivery is generally the place where the executed contract is deemed to have been made."

The sale agreement contemplated that this was to be an interstate transaction with delivery in Mississippi so that Appellant Bologna could get his rebate from the State on such sales. It was therefore an executory sale until completed by delivery in Mississippi. (R. 170-171.) (Appellant's Jurisdictional Statement, p. A28.)

It is quite plain that the Mississippi Courts have determined that the place of completion and delivery was Vicksburg, Mississippi and that this was consequently a Mississippi sale and not a Louisiana sale. That was a purely factual question.

2.

Whatever and wherever the original transaction might have been, it was superseded later by the written Notes and Deed of Trust evidencing such whiskey purchase and securing such purchase price. The Notes and Deed of Trust were executed in Mississippi. They were delivered in Mississippi. The Deed of Trust securing the Notes covered Mississippi land. These documents evidencing and securing the sale were entirely subject to the Laws of Mississippi which refuses to recognize such debt and such security. Section 2612, Mississippi Code of 1942.

This suit to remove and cancel a cloud on the title to Mississippi land filed in the Mississippi Chancery Court involved a Mississippi Deed of Trust, Mississippi land and a Mississippi foreclosure under said Mississippi Deed of Trust.

This was a matter exclusively for the Courts of Mississippi and did not involve any constitutional question whatever.

3.

In the execution and delivery of the Notes and Deed of Trust under which Appellant Bologna claims his spurious title, the remedy thereunder in Mississippi became a part of the contract as if expressly written therein.

Section 2612, Mississippi Code of 1942 provides that there is no remedy to enforce a whiskey debt in Mississippi wherever made.

This law applies to the citizens of Mississippi and to citizens of other states who seek to enforce such remedy in Mississippi and there is no favoritism or disclamation. The outside citizens and the local citizens are treated exactly alike.

In *Goodman v. Swett*, 108 Miss. 224, 66 So. 535 where the debt sued on was contracted in the State of Missouri, the Mississippi Supreme Court held that the above mentioned Section 2612 of the Mississippi Code of 1942 barred "*all persons from* collecting in the courts of this state any debt so contracted".

In the present case, the Mississippi Supreme Court interpreting the Mississippi Statute stated:

> "Indeed Bologna could not, *by this foreclosure,* have title vested in himself and thereby enforce an invalid debt, which, by statute, had been lost, and the security for which had become wholly void." Appellant's Jurisdictional Statement, page A11.

In so holding, the Supreme Court of Mississippi applying its own statutory law to its own land with equal force to Mississippians and citizens of other states holds that there is no remedy in Mississippi by foreclosure in pais to enforce a liquor debt.

Therefore the Mississippi Supreme Court holds that there is no remedy for the collection of an enforcement of a liquor debt in the Courts of Mississippi through court proceedings or by foreclosure in pais.

This was by implication written into the contract which the Appellant Bologna made in this case.

Even if the original sale was a Louisiana contract, which we most strongly deny, the remedy in Mississippi became a part of the sale which was not enforceable in Mississippi in the courts or by foreclosure in pais.

As we have previously pointed out, the original transaction became merged into the written Notes and Deed of Trust which were executed and delivered in Mississippi and are subject absolutely to Mississippi Law.

4.

The present action is a suit to remove a cloud on title involving land in Mississippi and is subject entirely to the law of property in Mississippi and the interpretation of Mississippi Statutes by the Mississippi Supreme Court.

5.

Regardless of where the sale was consummated, in Louisiana or Mississippi, Appellant Bologna admitted that he knew that the whiskey was purchased with the intention of reselling it in Mississippi in violation of law. He aided in that violation by making the bills of lading an interstate shipment across the state line for delivery into Mississippi where he knew that the sale of whiskey was prohibited by law.

He likewise knew that he had no remedy for the enforcement or collection of said debt in Mississippi and that became a part of his sale contract by necessary implication.

This type of transaction has been condemned for many years in many states. An example of the application of the rule is found in *Knowlton v. Doherty* decided by the Supreme Court of Maine in 1895 and reported in 33 Atlantic 18.

6.

Mississippi, in dealing with its own notes, deeds of trust and its own land is in no sense extraterritorial.

It is the Appellant Bologna who seeks to make the laws of Louisiana extraterritorial by imposing the Louisiana Law outside of his own state into the State of Mississippi against the expressed statutory law of Mississippi and against the expressed public policy of the State of Mississippi.

7.

Assuming for argument only that the transaction was a Louisiana sale, the Louisiana Law cannot be enforced in Mississippi under the full faith and credit clause or under the Fourteenth Amendment where such endorsement would be obnoxious to the strongly expressed public policy of Mississippi. (See Opinion of Mississippi Supreme Court, Jurisdictional Statement, p. A10.)

This Honorable Court so declared in *Griffin v. McCoach*, 313 U.S. 498, 85 L. Ed. 1481 and further held that:

> "It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of pubilc welfare as to require its courts to close their doors to its enforcement."

CONCLUSION.

The entire jurisdictional statement of the Appellant is predicated on the existence of a "Louisiana Contract" and a completed purchase of liquor in Louisiana, a factual situation adversely determined by a Court with proper jurisdiction.

Even so, the original transaction was merged into the written notes and Deed of Trust executed and delivered in Mississippi involving Mississippi land as security.

All questions have been fully determined without conflict by this Court.

The validity of the Mississippi Statute is not challenged.

The Mississippi Supreme Court has not expressly passed on any federal question in this case.

The judgment rests on an adequate non-federal basis.

We earnestly submit that there is no basis for the Supreme Court of the United States to assume jurisdiction of this thoroughly litigated local dispute.

Respectfully submitted,

FRANK E. EVERETT, JR.,
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810 First National Bank Building,
Vicksburg, Mississippi,
Attorneys for Appellee.

CERTIFICATE OF SERVICE.

I, Frank E. Everett, Jr., of counsel for Miss Hazel Morrissey, Appellee, in the above cause and a member of the bar of the Supreme Court of the United States, do hereby certify that service of the above Brief in Support of Appellee's Motion to Dismiss Appeal has been had upon Honorable Landman Teller, Counsel of Record for the Appellant by personally delivering a true and correct copy of the above and foregoing Brief to him at his office at 1205 Monroe Street, Vicksburg, Mississippi.

This the 12 day of April, 1961.

FRANK E. EVERETT, JR.,
Of BRUNINI, EVERETT, GRANTHAM & QUIN,
810 First National Bank Building,
Vicksburg, Mississippi,
Attorneys for Appellee.